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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

VIRGINIA ARAGON, Petitioner,

v.

LOCAL NO. 572, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this would be an appropriate case for the Supreme Court to exercise its supervisory and equitable powers to review and correct the Court of Appeals' decision in Aragon v. Federated Dept. Stores, Inc., 750 F.2d 1447 (9th Cir. 1985) ("Aragon"), wherein the Court of Appeals time barred the employee's action against her union for breach of the duty of fair representation by reliance on a case which had been overruled and which they acknowledged to be clearly erroneous and where application of existing precedent would not have time barred the employee's action.

2. Whether the Supreme Court's decision in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) ("DelCostello"), which held that the six-month limitations period in §10(b) of the National Labor Relations Act, 29

U.S.C. §160(b) would govern an employee's hybrid breach of contract/unfair representation action against the employer and union, should be applied retroactively to time bar the action against the union, when according to long-standing precedent on which the employee relied, the action was timely filed.

PARTIES

Defendants - Appellees, FEDERATED DEPARTMENT STORES, INC., dba RALPHS GROCERY COMPANY (hereinafter "Ralphs"); CHAUFFEURS, SALES DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL NO. 572, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA (hereinafter "Union"); PAPPY, VOGEL, KAPLON AND PHILLIPS, a professional law corporation; and RALPH M. PHILLIPS (hereinafter referred to collectively as "Attorneys"); were the only other parties in the proceedings before the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Virginia Aragon, respectfully requests that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on January 11, 1985.

OPINIONS BELOW

The Opinion and Judgment of the Court of Appeals affirming the District Court's Judgment in favor of Union and against Petitioner appears in Appendix A of this Petition and is reported at 750 F.2d 1447 (9th Cir.1985). The order of the Court of Appeals denying the Petition for Rehearing En Banc appears in Appendix B. The Judgment of the District Court in favor of Union appears in Appendix C and, to Petitioner's knowledge is unreported. The District Court's Findings of Fact and Conclusions of Law in connection with judgment in favor of Union appears in Appendix D. Relevant portions of Petitioner's First Amended Complaint which alleges a cause of action against her employer for wrongful discharge in breach of the collective bargaining agreement and against her union for breach of the duty of fair representation in the mishandling of her wrongful discharge grievance appear in Appendix E.

JURISDICTION

The Judgment of the Court of Appeal was entered on January 11, 1985. A timely Petition for Rehearing En Banc was denied on May 16, 1985, and this Petition for Writ of Certiorari was filed within 90 days of said denial. Jurisdiction to review the Opinion and Judgment of the Court of Appeals is conferred upon the Supreme Court by §1254(1).

STATUTES INVOLVED

Petitioner's action was brought pursuant to Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185 and 28 U.S.C. §1337(a). The statutes setting forth the policies underlying the National Labor Relations Act of 1935 and the Labor Management Relations Act of 1947 are 29 U.S.C. §141 and 29 U.S.C. §151, respectively. The statutes from where the various statutes of limitations were derived are §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) and Cal.Civ. Proc. Code §§338(1) and

1288. These are the statutes that are involved in this action and each statute appears in Appendix F.

PROCEDURAL HISTORY

Petitioner commenced the instant action on March 24, 1983, when she filed her complaint in the Superior Court of California in and for the County of Los Angeles. On August 2, 1983, as a matter of course, Petitioner filed her first amended complaint. Various defendants were soon thereafter served and on August 31, 1983, all defendants successfully petitioned for removal of the Petitioner's entire action to the United States District Court for the Central District of California, with the case being assigned to Chief Judge Manuel L. Real.

Petitioner's first amended complaint alleges, among other causes of action, that her employer discharged her in violation of the collective bargaining agreement; that her union prefunctorily, unfairly, dishonestly, fraudulently and maliciously represented

her in the ensuing grievance and arbitration proceedings; and that the attorneys retained by the union to represent Petitioner in said grievance and arbitration proceedings also represented her in a grossly neglectful and fraudulent manner.

As Petitioner's first amended complaint alleges a breach of collective bargaining agreement between an employer and a union representing employees in an industry affecting commerce, the district court has jurisdiction of the action pursuant to §301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a). Since Petitioner's first amended complaint also alleges an action against her union for breach of the duty of fair representation, which is derived from §9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §159(a), jurisdiction of the district court is also based on 28 U.S.C. 1337(a), which reads in pertinent part as follows: "The district court shall have original jurisdiction over any civil action

or proceeding arising under any Act of Congress regulating commerce . . .". The NLRA is an "Act of Congress regulating commerce." Retana v. Apartment, Motel, Hotel & Et. OP. U., Loc. No. 14, 453 F.2d 1018, 1021-22 (1972)

With respect to the actions against Ralphs for breach of the collective bargaining agreement and against Union for breach of the duty of fair representation, the district court, pursuant to F.R.C.P. Rule 56, granted summary judgments in their favor on the grounds that the actions against both the employer and union were time barred by retroactive application of the six month federal statute of limitations announced by the United States Supreme Court on June 6, 1983, in Del Costello. The district court also dismissed the state legal malpractice action against the Attorneys for failure to state a claim, F.R.C.P. Rule 12(b)(6).

On appeal, the Court of Appeals for the Ninth Circuit affirmed the judgments in favor

of Ralphs and Union and against Petitioner on the grounds that the actions against both were time barred by retroactive application of Del Costello's six month statute of limitations. The judgment in favor of Attorneys was, however, reversed and remanded to the district court with instructions to remand to the California state court.

Petitioner is now before this Honorable Court seeking writ of certiorari so that justice may be done.

FACTUAL SUMMARY

Virginia Aragon ("Aragon") began her employment at Ralphs Grocery Company on May 1, 1967. At the time of her discharge on December 1, 1981, she had been employed as a cheese packer in its deli-kitchen department, earning $11.59 per hour. Plaintiff was first in seniority in said department, having worked for Ralphs for over 14-1/2 years.

At all times relevant to this action

there was a written collective bargaining agreement in force between Ralphs and Union which controlled the terms and conditions of Aragon's employment at Ralphs. The collective bargaining agreement in pertinent part provided that Ralphs could not discharge an employee except for good cause and further that Ralphs and Union would not discriminate against an employee on account of sex, age, or for upholding the principles of unionism. Said collective bargaining agreement also contained a grievance procedure whereby an employee's discharge could be submitted to a neutral arbitrator for a hearing on the merits, and whose decision would be final and binding upon the parties. Pursuant to this collective bargaining agreement, Union was the sole and exclusive bargaining agent and representative of its union membership, including Aragon.

In her preceding 14-1/2 years working for Ralphs, Aragon received an award of merit and had never been issued a written warning

or disciplined in any manner. Then on August 11, 1981, Aragon's new supervisor, Bob Rivera, issued her her first written warning. In a four month period from August 11, 1981 to November 24, 1981, Rivera proceeded to issue Aragon six written warnings. Aragon contends that each of these warnings were unjustified and were an attempt to create a record of improper performance to support her ultimate discharge. For example, Aragon's first warning was for being in an unauthorized area. Aragon was returning from the restroom and it was not posted, nor was Aragon ever told that the area was unauthorized.

On November 27, 1981, Aragon did make a minor mistake in packing cheese underweight, which mistake could have been corrected in a matter of minutes, if given the opportunity. This mistake, in addition to six previous unjustified warnings, lead to her discharge on December 1, 1981. Furthermore, on many other occasions, other employees had commit-

ted even more serious mistakes and they were given the chance by Rivera to correct their mistakes and were not issued written warnings or disciplined in any way.

In a letter dated December 21, 1981, to the State Employment Development Department, Ralphs gave the following reasons for Aragon's December 1, 1981 discharge: (1) violation of company rules; (2) causing unrest and disturbance; (3) dishonesty in production responsibilities; (4) lack of cooperation in the work place; and (5) unsatisfactory work.

Aragon alleges that the reasons given by Ralphs for her December 1, 1981 discharge were false and were known by all defendants to be false. Aragon asserts that the real reason for her December 1, 1981 discharge was for retaliatory purposes because she would not permit her new supervisor, Bob Rivera, to discriminate against her in violation of the collective bargaining agreement; because she engaged in concerted union

activity; because she complained to her union and filed complaints with the State Department of Fair Employment and Housing and the National Labor Relations Board, and the Equal Opportunity Commission regarding the harassment and discriminatory treatment directed against her by Rivera.

Shortly after her December 1, 1981 discharge, Aragon sought the assistance of her union in contesting the discharge and seeking reinstatement and back pay. The union filed a grievance on Aragon's December 1, 1981 discharge which resulted in the matter being set for an arbitration hearing on March 12, 1982. The union had also retained a law firm to represent Aragon and other union members in grievances against Ralphs.

By the date of the arbitration hearing, Aragon had already been unemployed for 3-1/2 months, had been denied unemployment insurance benefits, had been denied food stamps and Medi-Cal benefits, was unable to find employment, and was not receiving income or

benefits from any source, all of which caused her to suffer severe emotional distress. It was under these conditions that Aragon attended her arbitration hearing.

On March 12, 1982, defendants Ralphs, Union and Attorneys took advantage of Aragon's dire mental, emotional and economic distress and, in collusion with each other, fraudulently coerced her into accepting a settlement of her December 1, 1981 discharge which was oppressive and against her interests. The settlement resulted in Aragon being reinstated without back pay on March 15, 1982. Such settlement also resulted in Aragon being demoted from cheese packer to sanitation worker and being switched from day shift to night shift. Such settlement further required plaintiff to waive all claims against Ralphs, including her claim for unemployment insurance benefits.

Aragon returned to work on March 15, 1982, but the harassment, discriminatory treatment, demotion and emotional distress

finally took their toll and forced her to quit on April 2, 1982.

In addition to alleging that her employer discharged her in violation of the collective bargaining agreement, Aragon alleges that her union and union attorneys breached their duty to her in the following respects, among others:

a. In failing to conduct a proper investigation of the facts underlying her December 1, 1981 discharge and April 2, 1982 constructive discharge;

b. In fraudulently coercing her to accept a settlement of her December 1, 1981 discharge that was oppressive and against her interests;

c. In failing to subpena witnesses and present evidence at her arbitration hearing which would have negated just cause for discharge; and

d. In failing to inform her of the limitations period for vacating arbitration awards.

After her December 1, 1981 discharge and her April 2, 1982 constructive discharge, plaintiff filed claims for unemployment insurance benefits with the State Employment Development Department on December 23, 1981 and May 3, 1983, respectively. On October 4 and 26, 1982, after lengthy and time consuming appeal procedures with the State Employment Development Department and with the California Unemployment Insurance Appeals Board, it was determined that Aragon was eligible to receive unemployment insurance benefits.

In spite of the economic hardship and severe emotional suffering that Aragon was compelled to endure, she managed to file her lawsuit within one year and twelve days of the March 12, 1982 date of accrual.

REASONS FOR GRANTING WRIT

I. THE COURT OF APPEALS TIME BARRED ARAGON'S ACTION AGAINST HER UNION BY RELYING ON SINGER, A CASE THEY KNEW WAS CLEARLY ERRONEOUS.

Once the Ninth Circuit Court of Appeals recognized in McNaughton v. Dillingham Corp. 707 F.2d 1042, 1047-48 (9th Cor.1983), ("McNaughton I"), that its previous decision in Singer v. Flying Tiger Lines, Inc., 652 F.2d 1349 ("Singer") was erroneous dictum, i.e., that the state statute of limitations for vacating arbitration awards did not apply to an employee's unfair representation action against the union, there was absolutely no justification for the Ninth Circuit to apply Singer's dictum to any subsequent case, including Glover v. United Grocers, Inc., 746 F.2d 1380, 1381 (9th Cir.1984) ("Glover") and Aragon, 752 F.2d at 1453, where to do so would only result in time barring Glover's and Aragon's actions against their unions by application of the extremely short state statutes of limitations (20 days in Oregon, 100 days in California) or DelCostello's six-month statute applied retroactively.

It is Aragon's contention that when the court is convinced that a previous decision

is erroneous, and especially when the rule in the erroneous case has been rejected in subsequent cases, such erroneous decision should not be followed to the extent that error may be perpetuated and grievous wrong be the result. 21 C.J.S. Courts §193.

Aragon contends that if the panel in Aragon would have followed the principles of stare decisis and interpanel accord, it would have correctly determined that at the time her §301 action accrued, she had three years to file against her union, in accordance with the long-standing precedent of Auto Workers v. Hoosier Corp., 383 U.S. 696, 704-05, 86 S.Ct. 1107, 16 L.Ed.2d 192, (1966) ("Hoosier"), which required courts to apply the most analogous and appropriate state statute of limitations, and Price v. Southern Pacific Transportation Company, 586 F.2d 750, 753 (9th Cir.1978) reh'g denied, Dec. 29, 1978 ("Price"), which held that California's three year statute for "an action upon a liability created by statute" was the

most appropriate statute of limitations to apply to an unfair representation action against the union. Furthermore, the six-month federal statute of limitations established by the Supreme Court in DelCostello on June 8, 1983, could not time bar Aragon's action since the Ninth Circuit had already established a long line of predecent which held that DelCostello's six-month limitation would not be applied retroactively to bar an employee's §301/unfair representation action against either the employer or union where to do so would shorten the time in which the employee had to sue. Scoggins v. Boeing Co. Inc., 742 F.2d 1225, 1227 (9th Cir.1984) ("Scoggins"); Rodriguez v. Union Carbide Corp., 735 F.2d 365-66 (9th Cir.1984) ("Rodriguez"); Barina v. Gulf Trading and Transportation Co., 726 F.2d 560, 562-63 (9th Cir.1984) ("Barina"); McNaughton v. Dillingham Corp., 722 F.2d 1459, (9th Cir. 1984), petition for cert. filed, 52 U.S.L.W. 3829 (U.S. May 15, 1984) (No. 83-1739)

("McNaughton II"); Edwards v. Teamsters Local 36, 719 F.2d 1036, 1040-41 (9th Cir.1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1559, 80 L.Ed.2d 130 (1984) ("Edwards")

Thus, as Aragon had three years in which to sue her union, according to Price, and as DelCostello's six month statute could not be retroactively applied, and as she promptly filed her complaint within 1 year and 12 days of accrual, her action was timely and the judgment of the Court of Appeals should be reversed and remanded for further proceedings.

Aragon agrees with the Aragon panel's initial analysis in seeking to determine what statute of limitations to apply to the action against her union:

> Thus, the relevant inquiry is which state statute of limitations governed Aragon's claim against the Local and against Ralphs on March 12, 1982, the day each cause of action accrued. If the state time limit was less than six months, then the six month federal statute of limitations would govern; Aragon's claim would fail. If the state time limit was greater than six months, then it would govern; the viability of Aragon's claim would

> depend on how much time the state statute of limitations gave her. (emphasis added)

Aragon at 1451

However, the Aragon panel abandoned its judicial undertaking to properly determine the applicable state statute of limitation at the time that Aragon's action accrued, and instead chose to rely exclusively on Glover for holding "... that Aragon's suit against the Local and Ralphs is time barred under both the applicable 100-day state statute of limitations and the longer, six-month, federal time limit, applied retroactive." Aragon, at 1453. The Aragon court appears to have relied on Glover simply because both Glover's and Aragon's actions accrued within the same time period -- post-Singer and pre-McNaughton I:

> Several weeks ago, this circuit decided a case whose facts parallel the facts of our case. In Glover, the claimant's cause of action accrued on August 9, 1982. This falls within the same window within which Aragon's accrual falls: post-Singer['s] [and] pre-McNaughton['s] .... Thus, Glover would seem to

> control this case; it held that the applicable statute of limitations was 100 days.

Aragon, at 1453.

The Aragon court by relying on Glover, also relied upon Singer, and it did so knowing that Singer was erroneous. "Glover, however, fails to address one thing: this circuit has called the Singer holding incorrect. It was not simply amended or improved upon. It was basically overruled." Aragon at 1453. Thus, once the court in Aragon erroneously determined that Aragon had 100 days in which to file her action at the time her cause of action accrued, instead of the three years as established in Price and reaffirmed in Edwards and Barina, it was now in a position to justify retroactive application of DelCostello's six-month limitation since it would appear to lengthen and not shorten the time in which Aragon had to file her suit. However, in deciding Aragon, the court failed to address the most important issue which is: Why, in the name of

justice, should Singer continue to bar claims against unions by its application of the extremely short 100-day statute of limitations, despite the acknowledged error of that holding?

It had long been established that under §301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. 185, an employee could bring an action against the employer for breach of the collective bargaining agreement and against the union for breach of the duty of fair representation. Hines v. Anchor Motor Freight, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976); Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964) However, Congress never specified what statute of limitations to apply to an employee's breach of duty of fair representation/breach of contract action when they are brought pursuant to §301 of the LMRA. Nor has Congress specified what statute of limitations would

apply to an employee's breach of duty of fair representation claim when it does not involve a §301 breach of contract claim against the employer.

In situations as this, where the federal cause of action did not provide an express statute of limitation, the long-standing general rule was to borrow the most analogous state statute of limitations.

> As early as 1830, the Court [Supreme Court] held that state statutes of limitations govern the timeliness of federal causes of action unless Congress has specifically provided otherwise. McClung v. Silliman, 3 Pet. 270, 277. In 1985, the question was re-examined in another context, but the conclusion remained firm. Campbell v. Haverhill, 155 U.S. 610. Since that time, state statutes have repeatedly supplied the periods of limitations for federal causes of action when federal legislation has been silent on the question. (Citations omitted)

Hoosier, 383 U.S. 696, 703-04, 86 S.Ct. 1107, 1112, 16 L.Ed.2d 192, 198-199 (1966)

In a §301 action against an employer brought by a union on behalf of employees to recover vacation pay pursuant to the collective bargaining agreement, the Supreme Court

in Hoosier, 383 U.S. at 704-05, 86 S.Ct. at 1113, 16 L.Ed.2d at 119, held that ". . . since no federal provision governs, we hold that the timeliness of a §301 suit, such as the present one, is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." The Supreme Court went on to hold that the necessity of uniformity (i.e. applying a uniform federal statute of limitations to all §301 actions) when choosing the applicable statute of limitations is not that great, and in so holding, also refused the opportunity to apply the six-month limitation of §10(b) of the National Labor Relations Act for filing unfair labor practice charges with the National Labor Relations Board to judicial actions brought pursuant to LMRA §301. Id. 383 U.S. at 702-03, 86 S.Ct. at 1112, 16 L.Ed.2d at198__.

Aragon relies on the case of Price v. Southern Pacific Transportation Company, 586 F.2d 750 (9th Cir.1978) reh den. ("Price")

which was decided by the Ninth Circuit on November 24, 1978, for the proposition that at the time her cause of action accrued and up to the filing of her complaint, she had three years to file. In Price, a railroad employee brought an action against his employer for wrongful discharge and against his union for breach of the duty of fair representation. This was the first time that the Ninth Circuit addressed the issue as to what statute of limitations would be applicable to an employee's action against its union for breach of the duty of fair representation.

The Court began its analysis by following the general rule that timeliness of federal actions, where no limitation is provided, "is governed by the appropriate state statute of limitations", citing Hoosier as authority. Next, the court acknowledged that "choice of the 'appropriate' state statute requires that the cause of action against the union be characterized properly and that [c]har-

acterization is a federal question. Butler v. Local 823, International Brotherhood of Teamsters, 514 F.2d 442, 446 (8th Cir.), cert. denied, 423 U.S. 924, 96 S.Ct. 265, 46 L.Ed.2d 249 (1975)". Price, at 752.

The Court went on to characterize the suit against the union as an action for breach of a statutory duty, "a federal obligation which has been judicially fashioned from national labor statutes" and concluded that California's three year statute for "an action upon a liability created by statute, ..." (Cal.Civ.Proc.Code §338(a)) applied to the employee's claim against the union. Id., at 753.

It was also observed that the California Supreme Court had interpreted the term "liability created by statute" to mean one in which no element of agreement enters and one which the law creates in absence of an agreement. This, the court felt, described precisely the duty of fair representation. Finally, the court made clear that its choice

of the three year statute was not dictated by the desire to make the same statute applicable to causes against both the employer and union. "In our view uniformity must yield to the results of proper characterization." Id., at 753.

On April 20, 1982, the Supreme Court decided United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981) ("Mitchell") which held that the state statute of limitations for vacating arbitration awards governed an employee's action against his employer for breach of the collective bargaining agreement brought pursuant to §301 of the LMRA. Id., 451 U.S. at 63, 101 S.Ct. at 1564, 1567, L.Ed.2d at 740. In so holding, the Court affirmed the general rule that the state statutes of limitations governed §301 actions.

> Congress has not enacted a statute of limitations governing actions brought pursuant to §301 of the LMRA. As this Court pointed out in Auto Workers v. Hoosier Cardinal

> Corp., 383 U.S. 696, 704-705 (1966) "the timeliness of a §301 suit . . . is to be determined as a matter of federal law, by reference to the most appropriate state statute of limitations."

Id., 451 U.S. 56 at 60, 101 S.Ct. at 1562, 67 L.Ed.2d at 738.

Mitchell started out as a suit by an employee against the employer for wrongful discharge in breach of the collective bargaining agreement and against the union for breach of its duty of fair representation in the handling of the ensuing arbitration hearing. However, the union was not a party to the proceedings before the Supreme Court, since only the employer petitioned for certiorari to review the Court of Appeals' decision. Id., 451 U.S. at 71, 101 S.Ct. at 1568, 67 L.Ed.2d at 745-746 (Stevens, J. concurring in part and dissenting in part)

Additionally, the suggestion by amicus curiae, AFL-CIO, that courts should apply the six-month limitations period found in §10(b) of the NLRA, 29 USC 160(b), was not addressed by the majority in Mitchell since

the issue was not raised by the parties and the Court's grant of certiorari was to determine what state limitations period should be borrowed and not whether such borrowing was appropriate. Id., 451 U.S. at 60 n. 2, 101 S.Ct. at 1562 n.2, 67 L.Ed. at 738 n.2.

Accordingly, the only question properly presented for the Court's review in Mitchell was ". . . which state statute of limitations period should be borrowed and applied to an employee's action against his employer under §301(a) of the Labor Management Relations Act, 1947 . . . " Id., 451 U.S. at 58, 101 S.Ct. at 1561, 67 L.Ed.2d at 737

The Court went on to conclude that the employee's suit against the employer was more analogous to an action to vacate an arbitration award than a straight contract action. Id., 451 U.S. at 62, 101 S.Ct. at 1564, 67 L.Ed.2d at 740. Thus, pursuant to Mitchell, California courts were required to apply the State's 100-day statute of limitations for vacating arbitration awards (Cal.

Civ.Proc.Code §338(1)) to an employee's §301 action against the employer.

However, whatever the Supreme Court said with respect to what statutes of limitations would be applied to the union was mere dictum, as the union was not a party to the Supreme Court proceedings, and this issue was not an issue that the Supreme Court was called upon to decide .... "[T]he only questioned properly presented for our consideration is whether the Court of Appeals chose the most appropriate New York statute of limitations to govern the employee's claim against his former employer for wrongful discharge." Id., 451 U.S. at 71, 101 S.Ct. at 1568, 67 L.Ed.2d at 746 (Stevens, J. concurring in part and dissenting in part). Furthermore, it was not necessary to determine what statute of limitations applied to the union in order to determine the rights of Mitchell and his employer, who were the only parties whose rights had to be determined.

Black's Law Dictionary, Revised Fourth Edition, at page 541, defines "dictum" as follows:

> Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of adjudication. Wheeler v. Wilkin, 98 Colo. 568, 58 P.2d 1223, 1226, Roquemore v. Sovereign Camp, W.O.W. 26 Ala. 146 So. 619, 622.

See also Brush v. Commissioner, 300 U.S. 352, 373, 57 S.Ct. 495, 501, 81 L.Ed. 691, 700 (1936); Ex Parte Bakelite Corp., 279 U.S. 438, 455, 49 S.Ct. 411, 415, 73 L.Ed. 789, 799 (1928); McCormick Harvesting Mach. Co. v. Aultman Co., 169 U.S. 606, 611, 18 S.Ct. 443, 445, 42 L.Ed. 875, 877 (1897). Additionally, whatever Justices Stewart and Stevens said in their concurring and dissenting opinions in Mitchell are not binding precedent. Concurring or dissenting opinions have no stare decisis effect. Alaska v. Troy, 258 U.S. 101, 111, 42 S.Ct. 241, 66 L.Ed. 487, 489 (1921).

On August 13, 1981, the Ninth Circuit decided Singer v. Flying Tiger Lines, Inc., 652 F.2d 1349 (9th Cir.1981) ("Singer"). On November 17, 1978, Mr. Singer, a flight engineer, filed an action against his employer and for failure to provide promotional opportunities in violation of the collective bargaining agreement and against the union for breach of the duty of fair representation. The district court rendered judgement in favor of employer and union and against Singer on the grounds that both claims were time barred by the applicable statutes of limitations, and Singer appealed.

On April 20, 1981, or approximately one month before oral argument in Singer, the Supreme Court decided Mitchell, which held that state statutes of limitations to vacate arbitration awards would be applicable to an employee's §301 action against his employer. The court in Singer also erroneously believed that Mitchell required the courts to apply the state limitation period for vacating

arbitration awards to suits against the union. The court obviously misread Mitchell, because Mitchell did not resolve the question as to what limitation period applied to §301 suits against unions. In any event, the court in Singer characterized the action against the employer as a suit upon written contract and applied California's four year statute contained in Cal.Civ.Proc.Code §377. With respect to the action against the union, the court followed Price in concluding that the three year limitation period contained in Cal.Civ.Proc.Code §338(1) applied. Singer, 652 F.2d at 1353.

Thus the actual holding in Singer was that it would be inequitable to retroactively apply the rule in Mitchell to parties who had been involved in litigation for at least the preceding three years and where before the appeal, neither the union or the employer asserted that the short statute of limitations would apply. Id. Therefore, the statement in Singer, that "[I]n the future

as Mitchell requires ... we shall treat suits against a union for breach of the duty of fair representation ... under this type of limitations statute" (California's 100 day statute for vacating arbitration awards contained in California Code of Civil Procedure §1288) was nothing more than erroneous dictum since it erroneously relied on the dictum of Mitchell in support of said statement.

On June 7, 1983, the Ninth Circuit decided McNaughton I, 707 F.2d 1042 (9th Cir.1983). In McNaughton I, the employee sued the employer for wrongful discharge in breach of the collective bargaining agreement and the union for breach of the duty of fair representation under §301 of the LMRA. The district court granted judgment in favor of employer and union on the grounds that McNaughton's claims were barred by Oregon's twenty-day limitation period for vacating arbitration awards, and McNaughton appealed. In undertaking to select the appropriate statute of limitations, the

court followed the established rule that:

> In light of the absence of an express statute of limitations for suits brought under §301 of the LMRA, the timeliness of said actions is determined by reference to the appropriate state statute of limitations. United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60, 101S.Ct. 1559, 1562-63, 67 L.Ed.2d 732, 738-39 (1981); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 704-05, 86 S.Ct. 1107, 1112-13, 16 L.Ed.2d 192, 199 (1966).

Id., at 1044

The significance of the McNaughton I decision is that it expressly held that "Mitchell did not resolve the question against a union of how an action for unfair representation should be characterized" and it was in agreement with Justice Stevens "that the claim against the union for unfair representation may not be 'characterized as an action to vacate an arbitration award.' 451 U.S. at 73, 101 S.Ct. at 1559, 67 L.Ed.2d at 746-47." Id, at 1047.

Therefore, according to McNaughton I, California's 100-day statute of limitations to vacate arbitration awards could not apply

to Aragon's claim against her union.

The Court in McNaughton I also recognized the error in Singer and undertook to correct it:

> In Singer v. Flying Tiger Line, Inc., 651 F.2d 1349 (9th Cir. 1981), a panel of this circuit believed that the rule in Mitchell extended to suits against the union:
>
> In the future, as Mitchell requires, when the action is commenced after an unfavorable arbitral decision, we shall treat suits against a union for breach of the duty of fair representation and against an employer for breach of the collective bargaining agreement under [a limitations statute for vacating arbitration awards]. Id. at 1353.
>
> . . . The court's belief that Mitchell's holding applied to actions against a union for unfair representation apparently was based on an erroneous assumption that the union as well as the employer had appealed from the ruling of the court of appeals . . . We now correct this error.

Id., at 1047 n.6.

McNaughton urged the court to apply the two-year limitation on professional malpractice actions (Or.Rev.Stat. 12.110) or the six-year limitation on actions upon contract or liability (Or.Rev.Stat. 12.110). The

court chose to characterize the claim against the union as a malpractice claim and applied the two-year statute. Id., at 1048. In doing so, the court in McNaughton I failed to follow, distinguish, or even discuss the prior Ninth Circuit precedent of Price, which held that suits against unions for breach of the duty of fair representation should be characterized as "an action upon liability created by statute." Price, 586 F.2d at 753. The panel in McNaughton I obviously erred in that it did not follow the rules of interpanel accord, "which provides that one panel of a Court of Appeals may not overrule a precedent set by another panel of the same circuit; only the Court of Appeals sitting in banc has the power to overrule a precedent set by a panel." 2 Fed Proc, L.Ed. §3:639. See also United States v. Paris, 448 F.2d 1276, 1277 (9th Cir. 1971); Charleston v. United States, 444 F.2d 504, 506 (9th Cir. 1971) Pet. for Cert. dismissed 404 U.S. 916, 92 S.Ct. 241. Therefore, by reason of the

rule of interpanel accord, Price was Ninth Circuit Court precedent as to how an action against the union should be characterized and such characterization required the California courts to apply the State's three year statute of limitations contained in Cal.Civ.Proc. Code §338(1) to actions against the union. This was the true precedent in the Ninth Circuit until it was overruled by the Supreme Court's decision in Del Costello.

The court in McNaughton I also affirmed the general principle that uniformity of statute of limitations in such actions was not that important.

> Uniformity, however, was only an incidental benefit, and not a critical factor to the court's holding. We reject the Local's argument tht the same statute of limitations should apply to plaintiff's claims against the union and employer. "[U]niformity of limitations periods, although desirable, is not the dominant consideration in selecting the appropriate statute of limitations. Rather, characterization of the claim is the touchstone . . ." Christianson, 681 F.2d at 579 n.1.

McNaughton I, at 1048.

On June 8, 1983, or 15 months after Aragon's action accrued and 2-1/2 months after the filing of her action, the Supreme Court decided DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103, S.Ct. 2281, 76 L.Ed.2d 476 (1983) ("DelCostello") which held that the six-month limitation period prescribed in §10(b) of the NLRA, 29 U.S.C. §160(b), applied to hybrid §301 actions against the employer for breach of contract and against the union for breach of the duty of fair representation. In so holding, the court overruled and criticized the holding in Mitchell: "We conclude that the state limitations periods for vacating arbitration awards fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under §301 and the fair representation doctrine." Id., 462 U.S. at 166, 103 S.Ct. at 2291, 76 L.Ed. at 490.

Although the Supreme Court established a new statute of limitations to such hybrid

§301 actions and applied it retroactively to time bar the claims before it, the court did not address, analyze or decide the retroactivity of DelCostello to pending actions, such as Aragon's.

On November 3, 1983, the Ninth Circuit decided Edwards v. Teamsters Local No. 36 (1983) ("Edwards"). Edwards brought a §301 action against his employer for wrongful discharge and against his union for breach of the duty of fair representation. Under the authority of Mitchell, the United States District Court for the Southern District of California dismissed the claims against both the employer and union as time barred. Edwards had filed his action nearly one year after his discharge and more than ten months after his grievance was unfavorably resolved.

Once again the Ninth Circuit followed the general rule that "the timeliness of a §301 action is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." Id.,

at 1038. The court in Edwards also agreed with the holding in McNaughton I that the claim against the union could not be "characterized as an action to vacate an arbitration award ..." and that the limitation period for vacating arbitration awards did not apply to unions. Id., at 1039. The court went on to hold: "We reaffirm Price's holding that the California statute of limitations applicable to suits against a union for breach of the duty of fair representation is the three year statute for actions 'upon a liability created by statute,' provided by Cal.Civ.Proc. Code §338(1)." Id. at 1040.

After oral argument in Edwards, the Supreme Court decided DelCostello. Thus, the appellate court had to decide whether it would retroactively apply DelCostello to time bar Edward's action against his union. In determining whether DelCostello would be applied retroactively, the Edwards court undertook a three factors analysis set forth in Chevron Oil Co. v. Huson, 404 U.S. 97,

106-107, 92 S.Ct. 349, 355, 30 L.Ed.2d 296, 306 (1971) ("Huson"):

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied ..., or by deciding an issue of first impression whose resolution was not clearly foreshadowed ... Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." ... Finally, we have weighed the inequity imposed by retroactive application for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Edwards, at 1040. (citations omitted)

The court concluded that the first criterion for nonretroactivity was met because DelCostello's new rule overruled past precedent of Price, which clearly applied a three year statute of limitations to actions against unions in California. Furthermore, Edwards could have reasonably relied on Price in filing his action. Id.

With respect to the second factor, the court found "that the reasons behind allowing actions against a union for the breach of the duty of fair representation would be disserved by barring suit by an employee when precedent existing at the time of filing permitted it. Huson, 404 U.S. at 107-08, 92 S.Ct. at 355, 30 L.Ed.2d at 306; Wiltshire, 652 F.2d at 841." Id. In other words, retroactive application of DelCostello would deny the discharged employee any remedy from union misconduct which would indeed be inconsistent with the policies sought to be promoted by the LMRA. See 29 U.S.C. §§ 141 and 151 (Appendix F). Furthermore, while recognizing that the collective bargaining system of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit, the Supreme Court in Vaca v. Sipes, 386 U.S. 171, 182, 87 S.Ct. 903, 912, 17 L.Ed.2d 842, 853 (1966), itself heralded the duty of fair representation as

"a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress."

The court also found that the third factor, "weighing of the equities", favored nonretroactivity:

> As the court stated in Huson, "It would ... produce the most 'substantial inequitable results' ... to hold that the respondent 'slept on his rights' at a time when he could not have known the time limitation that the law imposed on him." 404 U.S. at 108, 92 S.Ct. at 356, 30 L.Ed.2d at 306-07 (quoting Cipriano v. City of Houma, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647, 652 (1969); Wiltshire, 652 F.2d at 841-42.

Id., at 1040-41

After conducting the foregoing analysis, the court decided not to retroactively apply DelCostello to Edward's claim against his union. The court also stated that [r]etroactive application of a shorter statute of limitations than that pertaining when the case was filed is inherently unfair. Id., at 1040

From the foregoing it is obvious that

the principle espoused by the union and affirmed by the Ninth Circuit Court of Appeals is "pure dictum" and not "precedent". Neither Mitchell nor Singer judicially determined that an unfair representation action against a union should be characterized as an action to vacate an arbitration award.

Furthermore, prior to oral argument in Aragon, the Ninth Circuit in McNaughton I, Edwards, Barina, and Scoggins, and the Supreme Court in DelCostello criticized and overruled the principle that the extremely short state statutes of limitations applied to actions against unions.

When a former rule of law is contrary to logic and unrealistic, it becomes the duty of the court not to follow decisions that they are convinced are erroneous and obsolete. County of Los Angeles v. Faus, 48 C.2d 672, 679, 312 P.2d 680. "Previous decisions should not be followed to the extent that error may be perpetuated and that wrong may result." Id. "...[O]bvious

error need not be perpetuated by strict adherence to a court's earlier decision." Clarke v. Redeker, 406 F.2d 878, 882 (8th Cir.1969)

It appears that the Aragon court's reliance on Singer was motivated not by the desire to do justice between the parties, but instead by the desire to permit unions to avoid responsibility for the consequences of the breaches of their statutory duty of fair representation.

> Untangling our past web of decisions and revealing that two ... statutes of limitations -- 100-days on actions against employers and three years on actions against unions -- governed ... would serve no useful purpose: It would only penalize the union and reward the employer for problems that arise, initially, only because of the employer's breach of a collective bargaining agreement.

Aragon, at 1453

The Aragon court overlooks the fact that the action against the union for the breach of the duty of fair representation and the action against the employer for breach of contract, though related, are separate and

distinct causes of action. Furthermore, were it not for the union's failure to fairly represent Aragon, the employer's breach could have been remedied through the grievance process to her benefit and this lawsuit would not have been necessary. "Of paramount importance is the right of the employee, who has been injured by both the employer's and union's breach to be made whole." Bowen v. United States Postal Service, ____ U.S. __ , _____, 103 S.Ct. 588, 595, ___ L.Ed. __ , __ , (1983) ("Bowen").

There appears to be no reason why an employee's failure to prevail upon her claim for breach by one of the two should preclude recovery from the other. See Vaca v. Sipes, 386 U.S. 171, 195-98, 87 S.Ct. 903, 919-921, 17 L.Ed.2d 842 (1967). "Such a rule would prove especially harsh where, as here, the employee [Aragon] has lost one of [her] claims, not on the merits, but on the basis of a statute of limitations." McNaughton I at 1046. Thus, allowing Aragon to proceed

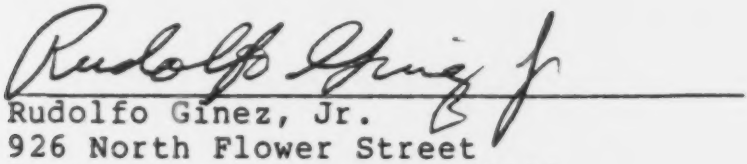
with her claim against her union under the prevailing facts would allow her to vindicate her substantial rights provided her by the Labor Management Relations Act and it would also promote federal labor policy by providing an incentive for unions to process its members' meritorious claims. Bowen, ___ U.S. at ___, 103 S.Ct. at 598, __ L.Ed.2d at ___.

CONCLUSION

Based on the foregoing, Aragon has clearly demonstrated that according to precedent of Price, Edwards, and Barina, she had three years to file suit against her union at the time her cause of action accrued. Since Ninth Circuit precedent of Edwards, McNaughton II, and Barina denied retroactive application of DelCostello's six-month statute, Aragon's action was timely filed under California's three year statute. Considerations of justice and equity require that the judgment of the Ninth Circuit Court

of Appeals be reversed and remanded for further proceedings. Petitioner, therefore, prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,



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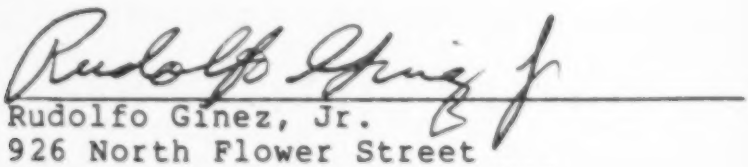

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APPENDIX "A"

OPINION OF THE COURT BELOW

In the United States Court of Appeals,

Ninth Circuit

No. 83-6435

Virginia ARAGON, Plaintiff/Appellant, vs. FEDERATED DEPARTMENT STORES, INC., dba Ralphs Grocery Company; Local Union No. 572, Pappy, Vogel, Kaplon and Phillips, a professional law corporation; and Ralph M. Phillips, Defendants/Appellees.

Argued and Submitted Dec. 4, 1984

Date Entered, Jan. 11, 1985

Appeal from the United States District Court
Central District of California

Before: SNEED, ANDERSON and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

Ralphs Grocery Co. ("Ralphs") fired plaintiff Virginia Aragon ("Aragon") on December 1, 1981. Aragon, who was represented in her employment and in the grievance procedures stemming from her dismissal by a Local of the Teamsters ("Local"), achieved reinstatement in a less favorable position,

without backpay, and on condition that she relinquish any further claims, on March 12, 1982. Discontented with this result, Aragon sued Ralphs for breach of its collective bargaining agreement in discharging her, and sued her union, the Local, for breach of its duty of fair representation in its pursuit of her grievance against Ralphs. In addition to this hybrid law suit against the union and the employer arising under the National Labor Relations Act, Aragon sued the Local's counsel for its alledged unsatisfactory work on her behalf.

It is the district court's judgment against Aragon and in favor of these few defendants, on these few claims, that Aragon now challenges on appeal. Aragon argues that the six-month statute of limitations prescribed by section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §160(b), which applies to hybrid suits against a union for breach of its duty of fair representation and against an employer

for breach of its collective bargaining agreement, should not be applied retroactively to bar her suit against the Local. Construed liberally, Aragon's assertion on appeal that this statute of limitations should be tolled as to Ralphs may be construed as a claim that the six-month statute of limitations referred to above should not be applied retroactively to bar her suit against her former employer, Ralphs. The resolution of these two claims depends in part on whether DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), which held that the six-month statute of limitations contained in the NLRA applies to hybrid suits of this sort, should be applied retroactively; and in part on whether prospective application of DelCostello would leave Aragon with a shorter or longer applicable state statute of limitations in DelCostello's stead.

Aragon also claims that she is entitled

to damages for emotional distress based on the union's breach of its duty of fair representation. Additionally, she argues that her malpractice claim against the Local's counsel should not have been dismissed. In connection with this malpractice claim, Aragon asserts: (it should have been remanded; (2) it was not preempted by federal labor law; (3) she alleged facts sufficient to withstand a motion to dismiss; (4) if the district court chose not to remand, it should have exercised pendent jurisdiction over this claim. Finally, Aragon seeks attorneys fees and costs of suit on this appeal.

FACTUAL AND PROCEDURAL HISTORY

Aragon worked for Ralphs for over fourteen years. Her employment commenced on May 1, 1967, and Ralphs discharged her on December 1, 1981. At the time of her discharge, Aragon was a cheese packer earning $11.95 an hour.

A written collective bargaining agreement

between Ralphs and the Local was in force at the time of Aragon's termination. It controlled the terms and conditions of her employment as well as the grievance and arbitration procedure to be followed at her discharge.

The Local filed a grievance on Aragon's behalf. The grievance was heard, and decided, on March 12, 1982. It resulted in Aragon's reinstatement without backpay on March 15, 1982. This time, she started a different job, on night shift rather than day shift, and she relinquished all her claims against Ralphs. She eventually left this job on April 2, 1982.

The Local and Aragon seem to agree that Aragon's cause of action accrued on March 12, 1982, when her termination grievance was settled at the hearing. Aragon filed her complaint in state court on March 24, 1983. The original complaint, however, was never served on any defendants. Aragon filed and served her first amended complaint on or

about August 2, 1983.

All defendants named in the first amended complaint joined together and timely removed that action from the Superior Court to the United States District Court on August 31, 1983. The district court ruled against Aragon and in favor or all defendants on motions for summary judgment, or to dismiss.

The district court granted summary judgment in favor of defendants Federated Department Stores, Inc. (Ralphs), Food Employers Council, Inc., Donald S. Prayzich, and Bob Rivera on each of Aragon's claims. As to these defendants, the court held: (the six-month statute of limitations prescribed by §10(b) of the NLRA, which applies to individual claims of breach of a collective bargaining agreement (DelCostello), barred Aragon's claim for breach of the collective bargaining agreement because it applied retroactively; and (2) federal labor law preempted each of Aragon's remaining state tort claims (breach of the implied covenant

of good faith and fair dealing, misrepresentation preventing employment, malpractice, fraud, and intentional infliction of emotional distress).

The district court also granted partial summary judgment in favor of the defendant Local. As to this defendant, the court held that the NLRA's six-month statute of limitations, because it applied retroactively, also barred Aragon's breach of the duty of fair representation claim. Finally, the district court granted the motion to dismiss of the Local's counsel, who represented Aragon in her grievance and arbitration proceedings, for failure to state a claim upon which relief could be granted.

In her appeal, Aragon abandons several of her claims against other defendants. She also abandons several of her state law claims against the defendants who remain in the case. Thus, the only state law claim remaining on appeal is the malpractice claim against Counsel. The federal law claims

remaining on appeal revolve around the appropriate statute of limitations to apply to the claims against Ralphs and the Local.

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. Lane v. Goren, 743 F.2d 1337, 1339 (9th Cir.1984) (citation omitted). "Summary judgment is improper if tolling of the statute of limitations requires the resolution of disputed factual issues." Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F2d 1030, 1033 (9th Cir.1983). "The search for the appropriate statute of limitations is a decision of law." Edwards v. Teamsters Local Union No. 36, 719 F2d 1036, 1039 (9th Cir.1983) cert. denied, _____ U.S. _____, 104 S.Ct. 1599, 80 L.Ed.2d i30 (1984) (citation omitted). In this case, there are no relevant contested issues of fact as to either the tolling issue or the statute of limitations issue. Thus, we review these questions of law de novo.

"A ruling on a motion to dismiss for

failure to state a claim upon which relief can be granted is a ruling on a question of law, freely reviewable by the court of appeals." Ray v. Union Bank, 725 F.2d 478, 479 (9th Cir.1984). A motion to dismiss should not be granted unless it appears to a certainty that the plaintiff can prove no set of facts in support of his or her claim that would show entitlement to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d at 479. Thus, the district court's dismissal of Aragon's malpractice claim against Counsel is freely reviewable by this court.

DICUSSION

1. Which statutes of limitations governs Aragon's claim against the Local for breach of its duty of fair representation and against Ralphs for breach of its collective bargaining agreement, when the claim accrued on March 12, 1982?

Aragon claims that Ralphs breached its collective bargaining agreement with the

Local by firing her. The parties do not dispute the facts relevant to determining whether Aragon's complaint was timely filed. Ralphs discharged Aragon on December 1, 1981. The Local filed a grievance on Aragon's behalf. The grievance was heard, and decided, on March 12, 1982. It resulted in Aragon's reinstatement without backpay on March 15, 1982. This time, she started a different job, on night shift rather than day shift, and she relinquished all her claims against Ralphs.

The Local asserts--and Aragon explicitly assumes as true--that Aragon's cause of action accrued on March 12, 1982, when her termination grievance was settled at the hearing. Cf., Barina v. Gulf Trading and Transportation Co., 726 F.2d 560, 561 and 562 n. 2 (9th Cir.1984); Price v. Southern Pacific Transportation Co., 586 F.2d 750, 754 (9th Cir.1978).

After reinstatement, Aragon resigned on April 2, 1982. Aragon claims that she was

forced to resign on this later date, and thus, that her resignation amounted to a constructive discharge. Aragon filed her complaint in this law suit on March 24, 1983. This was over fifteen months after her discharge, a little more than one year after her cause of action accrued, and almost one year after her subsequent resignation. The original complaint, however, was never served on any defendant. Aragon filed and served her first amended complaint on or about August 2, 1983. The parties seem to treat the March 24, 1983 date as the commencement of suit. As the discussion below reveals, however, both dates fall outside the statutes of limitations.

In DelCostello, the Supreme Court held that suits for breach of a union's duty of fair representation and suits for an employer's breach of a provision of a collective bargaining agreement shall both be subject to the six-month statute of limitations period of §10(b) of the NLRA, 29 U.S.C.

§160(b). Aragon argues that DelCostello should not be applied retroactively to bar her suit, whose filing date admittedly falls outside the six month period. The Local argues that DelCostello should be applied retroactively to bar Aragon's suit or, if the six-month statute of limitations does not apply retroactively, then the applicable state statute of limitations is even shorter and would still bar Aragon's suit.

Until a few weeks ago, this circuit had forcefully, repeatedly, and uniformly denied DelCostello retroactive application. The following quote of an entire per curiam opinion exemplifies this uniformity:

> Plaintiff appeals from the district court's grant of summary judgment in this action, finding it barred by the six-month statute of limitations set forth in DelCostello ....
>
> The action was removed to federal court in 1981. This court has previously held that DelCostello does not

apply retroactively. Barina v. Gulf Trading and Trasportation Co., 726 F.2d 560 (9th Cir.1984); McNaughton v. Dillingham Corp., 722 F.2d 1459 (9th Cir.1984); Edwards v. Teamsters Local 36, 719 F.2d 1036 (9th Cir.1983), cert. denied, _____ U.S. _____, 104 S.Ct. 1599 [80 L.Ed.2d 130] ...(1984).

We reverse and remand for a determination on the merits. Rodriquez v. Union Carbide Corp., 735 F.2d 365, 365-66 (9th Cir.1984) (only citations are omitted).

Application of this blanket rule would deny DelCostello retroactive application. The six-month federal statute of limitations would thus be inapplicable; the relevant state statute of limitations would govern.

A very recent case, however, has fashioned a limited exception to this rule. Glover v. United Grocers, Inc., 746 F.2d 1380 (9th Cir.1984), applied DelCostello retroactively. The court explained: "Where we have refused retroactive application in the past its

effect would have been to shorten the applicable state statute .... The retroactive effect of DelCostello is to lengthen, not shorten, the time in which Glover could have filed." If the state statute applicable to Aragon's were shorter than the six-month federal statute of limitations, then this exception would make the six-month statute of limitations applicable. Aragon's claim would then be time barred.

Thus, the relevant inquiry is which state statute of limitations governed Aragon's claim against the Local and against Ralphs on March 12, 1982, the day that her cause of action accrued. If the state time limit was less than six months, then the six-month federal statute of limitations would govern; Aragon's claim would fail. If the state time limit was greater than six months, then it would govern; the viability of Aragon's claim would depend on how much time that state statute of limitations gave her.

[1] The answer with respect to suits

against employers seemed clear for several years. The statute of limitations applicable to a defendant employer in a hybrid cause of action, like Aragon's, which accrued on March 12, 1982, was California's 100-day limit on filing suit to vacate an arbitration award, Cal.Civ.Proc.Code section 1288. McNaughton v. Dillingham Corp., 707 F.2d 1042, 1047 (9th Cir.1983), cert. denied, ___ U.S. _____, 105 S.Ct. 291, 83 L.Ed.2d 227 (1984) ("McNaughton I"); Singer v. Flying Tiger Line, Inc., 652 F.2d 1349, 1353 (9th Cir.1981). Aragon's claim against Ralphs is therefore time barred whether DelCostello applies retroactively or not.

The law of this circuit has been in a state of dissaray, however, as to which state statute of limitations governs claims against a defendant union in a hybrid cause of action against an employer and a union accruing on March 12, 1982. A brief history will illustrate the confusion.

On November 24, 1978, Price v. Southern

Pacific Transportation Co., 586 F.2d 750 (9th Cir.1978), held that the statute of limitations in a hybrid suit under the Railway Labor Act was three years in California. This time limit was supplied by California's statute of limitations on actions on liability created by statute, Cal.Civ.Proc.Code section 338. Price, 586 F.2d at 753.

On April 20, 1981, the Supreme Court decided United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981). The Court held that the extremely short time limit applicable to actions to vacate arbitration awards--90 days under the New York statute at issue, 100 days in California--applied to hybrid suits of this type. Id, at 64, 101 S.Ct. at 1564. That decision applied explicitly only to defendant employers; only the defendant employers appealed and raised the issue. The decision was, however, written in broad terms, and seemed to imply in dicta that this extremely short time period should

govern suits against defendant unions as well. Indeed, Mitchell's broad terms generated some of the confusion in later cases decided in our circuit.

On August 13, 1981, this circuit decided Singer v. Flying Tigers Line, Inc., 652 F.2d 1349 (9th Cir.1981). The Singer court held that, under the Railway Labor Act: "as Mitchell requires, ... we shall treat suits against a union for a breach of the duty of fair representation and against an employer for a breach of a collective bargaining agreement under this [100-day, vacation of arbitral awards] ... limitations statute." Singer, 652 F.2d at 1353. (The distinction between suits arising under the Railway Labor Act, like Price and Singer, and suits arising under the NLRA, like Mitchell and Aragon, is irrelevant for our purposes. See Barina v. Gulf Trading and Transportation Co., 726 F.2d 560, 563 n, 6 (9th Cir.1984). Singer thus held, based on reading Mitchell's dicta as binding precedent, that the statute of

limitations applicable to defendant unions was 100 days.

Then came March 12, 1982, the day that Aragon's claim accrued. According to Singer, but not necessarily to Mitchell, Aragon had 100 days to file suit--and she missed her deadline.

On June 7, 1983, one day before the Supreme Court decided DelCostello, this circuit decided McNaughton I, 707 F.2d 1042. The court in this case recognized the error in Singer, and undertook to "correct this error." McNaughton I at 1047 n. 6. In place of the 100-day, state vacation of arbitration award limit, McNaughton I substituted Oregon's two year malpractice statutes of limitation. (The McNaughton I decision made no mention of Price's previously controlling holding that actions of this sort against a union are governed by state statutes of limitations on actions created by statutes, rather than by state statutes of limitations on malpractice actions.) The claimant's cause

in McNaughton I, which accrued on January 16, 1981, was therefore timely filed nine months later on October 20, 1981. Of course, January 16, 1981, the date of accrual, is both pre-Singer's implication that the 100-day time limit applies and pre-Aragon's date of accrual. In contrast, the date of accrual of Aragon's action is post-Singer-and pre-McNaughton I's holding that a longer statute of limitations applied.

DelCostello was decided by the Supreme Court on June 8, 1983, one day after McNaughton I. Its decision that the federal, six-month statute of limitations is applicable in these cases does not affect this short history of the applicable California statute of limitations on March 12, 1982.

On November 3, 1983, Edwards v. Teamsters Local Union No. 36, 719 F2d 1036 (9th Cir. 1983) was decided. Although the Edwards court cited McNaughton I, it ignored McNaughton I's holding that Oregon's two-year malpractice statute of limitations applied

to claims against unions. Instead, Edwards held: "we reaffirm[!] Price's [pre-McNaughton] holding that the California statute of limitations applicable to a suit against a union for breach of the duty of fair representation is the three years statute for actions 'upon a liability created by statute,' provided by Cal.Civ.Proc.Code section 338(1)." Edwards, 719 F.2d at 1040. Of course, in Edwards, the date of accrual of claimant's action was early 1981. This date of accrual in McNaughton I, is both pre-Singer's implication that the 100-day time limit applies and pre-Aragon's date of accrual. In contrast, the date of accrual of Aragon's action is post-Singer; pre-McNaughton I's holding that a longer malpractice statute of limitations applied; and pre-Edwards' holding that a longer, but different statute of limitations upon actions based on statutes applied.

The time period with which we are faced--actions accruing after Singer but before

McNaughton I--has not yet been addressed by any of these cases. Nor does the next case in this history address the time period in which Aragon's claim falls. That next case is McNaughton v. Dillingham Corp., 722 F.2d 1459 (9th Cir.1984) ("McNaughton II"), decided on January 4, 1984. McNaughton II both reaffirmed McNaughton I (which applied the two year malpractice statute of limitations to actions against unions) and cited the recently decided Edwards case (which applied the three year statute of limitations on actions based on statutes to actions against unions) with approval. Thus, McNaughton II adds no further insight to the statute of limitations applicable to the date of accrual in Aragon's case.

The next case in the history is Barina v. Gulf Trading and Transportation Co., 726 F.2d 560 (9th Cir.1984), decided on February 23, 1984. The Barina court declined to apply DelCostello or Mitchell retroactively; the longer state statute of limitations therefore

governed, but the court did not specify which statute of limitations that was. The date of accrual of claimant's cause of action in Barina was July 12, 1980. Id. at 562 n. 2. This date of accrual, like the date of accrual in McNaughton I and in Edwards, is: pre-Singer's implication that the 100-day time limit applies; and pre-Aragon's date of accrual. In contrast, the date of accrual of Aragon's action is post-Singer; pre-McNaughton I's holding that a longer malpractice statute of limitations applied; pre-Edwards' holding that a longer, but different statute of limitations upon actions based on statutes applied; and pre-Barina's holding that a longer, but unspecified statute of limitations applied.

Scoggins v. Boeing Co., 742 F.2d 1225 (9th Cir.1984), decided on September 18, 1984, follows the same pattern: a three year statutes of limitations, under Washington state law, is applied to the action against the union; claimant's cause of action

accrued, however, in August of 1980. Id, at 1228.

Several weeks ago, this circuit decided a case whose facts parallel the facts of our case. In Glover, the claimant's cause of action accrued on August 9, 1982. This falls within the same window within which Aragon's accrual falls: post-Singer's holding that the 100-day statute of limitations applied; pre-McNaughton I's holding that a longer malpractice statute of limitations applied; and pre-Barina's holding that a longer, but unspecified statute of limitations applied. Thus, Glover would seem to control this case; it held that the applicable California statute of limitations was 100 days.

Glover, however, fails to address one thing: this circuit has called the Singer holding incorrect. It was not simply amended or improved upon. It was basically overruled. This is what became of Singer's 100-day holding:

> In Singer ..., a panel of this cir-

> cuit believed that the rule in Mitchell extended to suits against the union....
>
> ... The [Singer] court's belief that Mitchell's holding applied to actions against a union for unfair representation apparently was based on an erroneous assumption that the union as well as the employer had appealed from the ruling of the court of appeals.... We now correct this error.

McNaughton I, 707 F.2d at 1047 n. 6.

This court now faces a choice. We can follow Glover and hold that Aragon's suit against the Local and Ralphs is time barred under both the applicable 100-day state statute of limitations and the longer, six-month, federal time limit, applied retroactively. Or, we can address the issue that the Glover court declined to address: whether Singer should continue to bar claims against unions by its application of the extremely short, 100-day statute of limitations, despite the acknowledged error of

that holding.

[2] We choose the first approach. It comports with Glover, decided just a few weeks ago, and thus adds some needed consistency to this area of the law. It also comports with the federal labor relations policy that: "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." NLRA section 7, 29 U.S.C. section 157. Untangling our past web of decisions and revealing that two widely divergent statutes of limitations--100-days on actions against employers and three years on actions against unions--governed during this shadowy period between Singer and McNaughton I would serve no useful purpose. It would only penalize the union and reward the employer for problems that arise, init-

ially, only because of the employer's alleged breach of a collective bargaining agreement. The law of this circuit can be construed as applying that same statute of limitations to actions against both unions and employers at the time that Aragon's claim arose; we choose that construction. We therefore affirm the district court's grant of summary judgment in favor of defendants Ralphs and the Local on the § 301 claim. Thus, we need not address Aragon's argument that she is entitled to damages of emotional distress on her breach of duty of fair representation claim.

2. <u>This short statute of limitations should not be tolled in this case.</u>

On appeal, Aragon makes only one reference to tolling. She lists, as her last issue, "Whether the statutes of limitation on plaintiff's cause of action against RALPHS for breach of the collective bargaining [sic] should be tolled." She never addresses the issue, never cites to any authority on this

issue, and never raises any facts to justify tolling in her case. Her claim also fails on the merits.

Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030 (9th Cir.1983), controls the disposition of this issue. In Hub the union--rather than an individual, like Aragon--sued the employer to enforce a collective bargaining agreement. That case, which was decided one day before DelCostello was decided, held that when a federal court borrows a state statute of limitations in claims arising under the Labor Management Relations Act, 29 U.S.C. section 185, the federal court may also borrow the state's tolling provisions. DelCostello, decided one day later, held that the federal courts shall not borrow the states statute of limitations in actions against the employer and the union; thus, the federal courts may also be precluded from borrowing the state's tolling provisions. If, however, it is appropriate to borrow California's tolling

provisions, Hub sets the analytical framework for doing so in a labor law case.

> California equitably tolls the statute of limitations during the pendency of an earlier action if there is "timely notice, and lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff." ... The two actions [upon which the claimant basis the claim for benefit of equitable tolling] need not be identical....
>
> Equitable tolling should not be applied in a manner that frustrates national labor-management policy. We believe that policy is fostered by having the NLRB attempt to resolve an issue before a party resorts to a section 301 action. Thus, if tolling is appropriate in this case, it would not be inconsistent with the constitution or with the applicable federal labor laws.

Id. at 1033 (citations omitted).

In Hub, the union filed an unfair labor practice charge with the NLRB years before it sued Hub for damages in federal court. The existence of these two actions meant that: (1) tolling the statute of limitations did not impede, but actively promoted, the federal policy of "having the NLRB attempt to resolve an issue before a party resorts to a section 301 action"; (2) the first action, though not identical to the second, provided the employer with the notice and lack of prejudice necessitated by state law; and (3) the first action showed the plaintiff's reasonable and good faith conduct. Thus, the statute of limitations was tolled.

[3] In Aragon's case, however, no comparable filing by Aragon promoted federal labor concerns, notified the employer about the possible pendency of this action, or showed plaintiff's reasonable and good faith pursuit of her remedies. The only official action that she took that could possibly be construed as promoting federal policy, there-

by allowing this court to apply California's tolling provisions, is filing claims for unemployment benefits and pursuing these claims through appeal. In fact, it is this action that Aragon raised as a basis for tolling in the district court. These actions do not, however, rise to the level of promoting national labor-management policies in the same way that pursuing claims with the NLRB does. Nor do they notify an employer of the possible pendency of a law suit or show plaintiff's reasonable pursuit of her remedies. Thus, it would be inappropriate to toll Aragon's cause of action against Ralphs.

3. The district court erred in dismissing Aragon's malpractice claim against the Local's counsel.

The district court dismissed Aragon's malpractice claim against Counsel for failure to state a claim under Fed.R.Civ.Proc. 12(b)(6). Aragon argues that the claim should not have been dismissed. She asserts that her state malpractice claim is not pre-

empted by federal labor law; that it alleges facts sufficient to withstand a motion to dismiss; and thus that the district court shall have either retained the claim under its pendent jurisdiction or remanded the claim to state court. Counsel asserts that Aragon's claim arises under federal law and was properly removed to federal court, but that it was correctly dismissed for two reasons: (1) it was preempted by federal labor law. and, (2) it failed to state a cause of action.

a. Federal law does not preempt the malpractice claim.

The test for preemption in the labor law field demands that a balance be struck between competing interests.

> [T]he cases reflect a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation. As we said in Vaca v. Sipes, 386 U.S. [!71] at 180 [87 S.Ct.

> 903 at 911, 17 L.Ed.2d 842] [1967], our cases "demonstrated that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interest being asserted and the effect upon the administration of national labor policies of concurrent juducial and administrative remedies."

Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25, 430 U.S. 290, 300-01, 97 S.Ct. 1056, 1063-64, 51 L.Ed.2d 338 (1977).

Based on this balance, federal law pre-empts a state tort suit by an employer for damages arising from the peaceful picketing of the company by labor unions, because this conduct is regulated by NLRA sections 7 and 8. 29 U.S.C. sections 157 and 158. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244-48, 79 S.Ct. 773, 779-81, 3 L.Ed.2d 775 (1959). Federal law similarly preempts a state tort suit against a union

complaining of the union's hiring practices and the complainant's resulting inability to obtain employment. This conduct was also regulated by NLRA sections 7 and 8. Local 100, United Association of Journeymen & Apprentices v. Borden, 373 U.S. 690, 694-95, 83 S.Ct. 1423, 1425-26, 10 L.Ed.2d 638 (1963). Federal law also preempts a former union member's law suit against his union for dismissing him from the union and procuring his dismissal from employment, where the resolution of the issue depends on the construction of the collective bargaining agreement and the union constitution. In such a case, again, the conduct "was arguably protected by section 7 or prohibited by section 8 of the [NLRA]." Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 293, 91 S.Ct. 1909, I921, 29 L.Ed.2d 473 (1971).

Federal law does not, however, preempt a state tort action for infliction of emotional

distress, where the action meets the strict requirement "that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." Farmer, 430 U.S. at 305, 97 S.Ct. at 1066. Nor did federal law preempt the cause of action asserted in International Association of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018 (1958).

> Gonzales was a suit against a labor union by an individual who claimed that he had been expelled in violation of his contractual rights and who was seeking restoration of membership....
>
> The Gonzales decision, it is evident, turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly

> with matters of employment, and that the principle relief sought was restoration of union membership rights.

Borden, 373 U.S. at 696-97, 83 S.Ct. at 1427. This circuit, in Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (9th Cir.1984), petition for cert. filed, 53 U.S.L.W. 310 (June 27, 1984), held that plaintiff's claim that he had been wrongfully discharged in violation of state policy. The action was removed to federal court; this circuit then decided that the action was improperly removed, and that the district court lacked jurisdiction. Id. at 1368.

The threshold issue in Garibaldi, like in all removal actions, was whether the removal jurisdiction was properly based on a federal claim stated in the complaint.

> However, where the state claim has been preempted by federal law, it does not follow that the federal court has jurisdiction. The circuit has repeatedly held that preemption, as a defensive

> allegation, is not grounds for removal....
>
> Although ordinarily a preempted claim may not be removed to federal court, the "artful pleading" doctrine provides the rationale for the assertion of federal jurisdiction in some cases.... This doctrine allows the removing court to look at the true nature of the plaintiff's complaint when the plaintiff has attempted to avoid a federal cause of action by relying soley on state law in the complaint.... We have followed this doctrine in allowing removal based on preemption in certain labor cases....
>
> Lucky Food Stores asserts that the suit is properly removed under the artful pleading doctrine because Garibaldi's claim is preempted. However, Lucky Food Stores has missed the second step in analysis.

Id. at 1370 (citations omitted). That second step is looking at the true nature of the

plaintiff's complaint. See also Hunter v. United Van Lines, 746 F.2d 635, 642-643 (9th Cir.1984) ("Garibaldi made it clear that a state-law claim may be recharacterized as a federal claim only when the state-law claim is preempted by federal law and when it is apparent from a review of the complaint that the federal law provides plaintiff a cause of action to remedy the wrong he asserts he suffered,") (emphasis in original).

In Garibaldi, the court held that "Garibaldi's allegation that he was discharged in violation of public policy comports with the limitations of the Farmer holding." 726 F.2d 1374. Federal law did not preempt the wrongful discharge claim, and removal was improper. The court stated:

> A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does not alter the economic relationship between the employer and employee. The

> remedy is in tort, distinct from any contractual remedy an employee might have under the collective bargaining contract. It further's the state's interest in protecting the general public--an interest which transcends the employment relationship.

Garibaldi, 726 F.2d at 1375 (emphasis in original).

[4] The state malpractice claim that Aragon brings also falls within the limitations of the Farmer holding. It poses no significant threat to the collective bargaining agreement. See Pedro v. Teamsters Local 490, 509 F.Supp. 83,85 (N.D.Cal.1981) ("labor organizations... and employers are the only proper defendants in action under" the NLRA; the union's attorneys are not). The malpractice claim does not alter the economic relationship between employer and employee; it alters only the relationship between the former employee and a wholly separate entity, the union's counsel. The remedy is in tort,

and it is based on the standard of care the attorney owes the client; it is not a contractual remedy under a collective bargaining agreement. It also furthers the state's interest in protecting the public from legal malpractice, an interest that transcends labor law.

The few factually similar cases decided in this circuit are in accord with this conclusion.[1] In Pedro v. Teamsters Local 490, 509 F.Supp. 83 (N.D.Cal.1981), a discharged employee brought a suit against his employer for breach of the collective bargaining agreement, against the union for breach of the duty of fair representation, and against the union's attorneys who were retained to represent him in the arbitration proceedings. The court characterized the action against Pedro's attorneys as a state malpractice claim, and went on to hold that because this claim added the attorneys as defendants, "the ... claim changes from a mere pendent claim to a claim adding pendent

parties, as to whom there is no independent basis for federal subject matter jurisdiction." Id. at 85. This circuit's strong policy against pendent party jurisdiction formed the basis for the court's holding that pendent party jurisdiction was lacking as to the attorneys. The court concluded, however, that "[p]laintiff also is not without remedy in state court on his claims against the lawyer defendants." Id. at 86.

In Weitzel v. Oil Chemical & Atomic Workers International Union, 667 F.2d 785 (9th Cir.1982), Weitzel filed suit against his union for breach of the duty of fair representation and against the union's law firm for legal malpractice. This circuit affirmed the district court's dismissal of the claim against the union, but reversed the dismissal of the claim against the attorneys. "We conclude that summary judgment was inappropriate because genuine issues of fact remained in the case, both as to the breach of an attorney-client relationship

and as to casual relationship of the breach, if any, to the plaintiff's alleged lack of success." Id. at 787. Thus, these decisions also support the conclusion that Aragon's malpractice claim is not preempted.

Because federal law neither preempts the state malpractice claim nor provides an independent federal remedy in its place, the district court erred both in retaining jurisdiction over this state law claim and in dismissing it for failure to state a claim.

b. Aragon's malpractice claim should have been remanded to the state court.

[5] Pendent jurisdiction depends upon the federal court's jurisdiction over one claim, to which the second, nonfederal claim may be appended.

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a [federal] claim..., and the relationship between that claim and the state

> claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court.

United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966) (footnote omitted; emphasis in original). See also Pedro, 509 F.Supp. at 85.

[6] Aragon's federal claim against the Local for breach of its duty of fair representation and against Ralphs for breach of the collective bargaining agreement are time-barred. Thus, no independent federal claim confers subject matter jurisdiction on the federal court. Without a federal claim upon which to append the related state cause of action, the federal court has no basis for asserting jurisdiction over Aragon's malpractice claim. But see Weitzel, 667 F.2d 785, 787 (appellate court reversed and remanded--apparently to the district court--

the former employee's malpractice claim against the union's law firm for the determination of a factual issue as to whether an attorney-client relationship existed and for a related state law issue regarding the statute of limitations). Pendent jurisdiction is therefore inappropriate in Aragon's case.

[7] Because Aragon's malpractice claim was not preempted by federal law, and because there exists no independent basis of federal jurisdiction over Aragon's hybrid claim against the Local and Ralphs, the district court had no jurisdiction over this claim. It should be remanded to the district court with instructions to remand to the California state court. It is the province of that state court, not the district court, to determine whether Aragon has alleged facts sufficient to withstand a motion to dismiss. See Garibaldi, 729 F.2d 1367, 1376 ("Removal [of state wrongful discharge claim] was improper. Because the district court had no

jurisdiction over this case, we reserve and remand to the district court with instructions to remand to the California state court.")

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

1. In Sklios v. Brotherhood of Teamsters and Auto Truck Drivers Local 70 of Alameda County, 503 F.Supp. 123 (N.D.Cal.1980), however, the court held that the state tort and contract claims asserted against all defendants--including the attorneys--were preempted by federal labor law. Id. at 124-25. "[T]he conduct alleged as a basis for the state law claims--wrongful discharge as the result of collusion between the employer and the union--clearly falls within the purview of federal labor regulation." Id. at 125. However, it appears that no separate state malpractice claim was brought against the attorneys in that case. More importantly, the decision in that case was reversed on appeal, without a published opinion. 672 F.2d 923 (9th Cir.1982).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGINIA ARAGON, Plaintiff,	)	NO. 83-6435
	)	DC No. CV 83-5647-R
	)	ORDER DENYING
vs.	)	REHEARING EN BANC
FEDERATED DEPARTMENT STORES, INC., et al., Defendants.	)	Date Entered: May 16, 1984

Before: SNEED, ANDERSON and FERGUSON, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VIRGINIA ARAGON,	)	No. 83-5647-R
	)	
Plaintiff,	)	PARTIAL
	)	SUMMARY
vs.	)	JUDGMENT
	)	
FEDERATED DEPARTMENT	)	
STORES, INC., et al.,	)	Date Entered:
	)	November 10, 1983
Defendants.	)	
	)	

This cause having come on to be heard on the Motion of Defendant CHAUFFEURS, SALES DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL 572, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA for partial summary judgment to the First Cause of Action pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Court, having considered the pleadings, points and authorities, exhibits and declarations submitted in support and in opposition thereof,

NOW, THEREFORE, by reason of the law and

findings aforesaid,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That the Motion by Local 572 for partial summary judgment to the First Cause of Action of the First Amended Complaint in the instant proceeding is granted; and

2. That Local 572 shall recover its costs of suit incurred herein in defense of this action.

Dated: Nov. 8, 1983

/s/
United States
District Court Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VIRGINIA ARAGON,	)	NO. 83-5647-R
Plaintiff,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	)	
FEDERATED DEPARTMENT STORES, INC., et al.,	)	Date Entered: November 10, 1983
Defendants.	)	

The Motion for Partial Summary Judgment to the First Cause of Action by Defendant CHAUFFEURS, SALES DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL 572, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ("Local 572") having come on regularly before the Court on Monday, October 17, 1983 at 10:00 a.m., Local 572 having been represented by Robert D. Vogel, Esq. of Pappy, Kaplon, Vogel & Phillips and Plaintiff VIRGINIA ARAGON ("Aragon") having been represented by Rudolfo Ginez, Jr., and being advised in the premises, the Court

does now find and declare as follows:

I.

On December 1, 1981, Aragon was terminated by her former employer, Ralphs Grocery Co. ("Company"). She was later reinstated by the Company but subsequently thereafter resigned on April 2, 1982.

II.

The last contact Aragon and/or her legal counsel had with a representative of Local 572 concerning the terms and conditions of her employment with the Company occurred on or about August 5, 1982 when her counsel received a letter dated August 4, 1982 from Local 572's counsel in response to a July 30, 1982 letter from Aragon's legal counsel to Local 572's business agent requesting his assistance in providing certain documentation concerning an unemployment insurance hearing concerning Aragon.

III.

The initial Complaint that was filed in this case but which was not served upon Local

572 was filed in the Superior Court of the State of California for the County of Los Angeles on March 24, 1983. The First Amended Complaint which was eventually served upon Local 572 in this case was filed on July 27, 1983.

IV.

To the extent that any Conclusions of Law are deemed to be Findings of Fact, they are incorporated herein as Findings of Fact.

CONCLUSIONS OF LAW

From the following Facts, the Court makes the following Conclusions of Law.

I.

To the extent that any Findings of Fact are deemed to be Conclusions of Law, they are incorporated herein as Conclusions of Law.

II.

The undisputed facts of this case conclusively establish that Aragon filed her Complaint alleging that Local 572 breached

its statutory duty of fair representation after the applicable statute of limitations, the six-month statute of limitations set forth in Section 10(b) of the National Labor Relations Act,had elapsed.

III.

The undisputed facts of this case conclusively establish that Local 572 is entitled to summary judgment to the First Cause of Action of the Amended Complaint as a matter a law.

IV.

The First Cause of Action of the Amended Complaint shall be dismissed with prejudice and summmry judgment ordered as to Local 572 and it shall be awarded all costs incurred in defense of this action.

Dated: Nov. 8, 1983 /s/
United States
District Court Judge

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

VIRGINIA ARAGON,	)	Case No. C447056
	)	
Plaintiff,	)	FIRST AMENDED
	)	COMPLAINT FOR
vs.	)	DAMAGES AND
	)	REINSTATEMENT
FEDERATED DEPARTMENT	)	
STORES, INC., et al.,	)	Date Filed:
	)	August 2, 1983
Defendants.	)	
	)	

FIRST CAUSE OF ACTION

CAUSE OF ACTION FOR DAMAGES AND REINSTATEMENT UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT (29 USC SEC. 185) AGAINST FEDERATED DEPARTMENT STORES, INC., dba RALPHS GROCERY COMPANY FOR WRONGFUL DISCHARGE AND AGAINST LOCAL UNION NO. 572 FOR TORTIOUS BREACH OF THE DUTY OF FAIR REPRESENTION

1. Plaintiff, VIRGINIA ARAGON, is an individual residing in the City of Baldwin Park, County of Los Angeles, State of California.

2. Defendant FEDERATED DEPARTMENT STORES, INC., is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Delaware and was authorized to transact business, and was transacting business within the State of California.

3. Plaintiff began her employment relationship with the business entity known to her as Ralphs Grocery Company on May 1, 1967. Plaintiff is informed and believes and thereon alleges that on or about January 1970, the business entity known to her as Ralphs Grocery Company merged with or was acquired by defendant FEDERATED DEPARTMENT STORES INC. Defendant FEDERATED DEPARTMENT STORES, INC., continued the operation of such business enterprise under the fictitious name of Ralphs Grocery Company. There was substantial similarity of operation and continuity of identity of the business enterprise both before and after merger or acquisition by defendant FEDERATED DEPARTMENT

STORES, INC. and therefore any employment contract or collective bargaining agreement between plaintiff and her predecessor employer is binding upon defendant FEDERATED DEPARTMENT STORES, INC. For convenience in pleading, defendant FEDERATED DEPARTMENT STORES, INC. shall hereinafter be referred to as "RALPHS". Plaintiff was continuously employed by said predecessor employer and successor employer, defendant RALPHS from May 1, 1967 until April 2, 1982, when she was unlawfully forced to resign, as more specifically hereinafter alleged.

4. Defendant RALPHS is and was engaged in the production and distribution of food items, with its principal office and place of business located at 1100 West Artesia Boulevard, City of Compton, County of Los Angeles, State of California. At all times material to this action, defendant RALPHS was engaged in an industry which substantially affected interstate commerce.

5. At all times herein mentioned

defendant BOB RIVERA, hereinafter referred to as "RIVERA", was employed by defendant RALPHS in the capacity of supervisor of its deli-kitchen department and in doing the things hereinafter alleged was acting within the course and scope of such employment and agency. Furthermore, the arbitrary, malicious, oppressive and discriminatory actions directed against plaintiff by defendant RIVERA, as hereinafter alleged were urged, approved, confirmed, ratified and adopted by defendant RALPHS.

6. Defendant FOOD EMPLOYERS COUNCIL, INC., hereinafter referred to as "EMPLOYERS COUNCIL", is and at all times herein mentioned was a labor association organized and existing under the laws of the State of California, with its principal place of business located at 2599 South Flower Street, City of Los Angeles, State of California.

7. Defendant DONALD S. PRAYZICH, hereinafter referred to as "PRAYZICH", is and was an attorney at law duly licensed to

practice as such by the State of California. At all times herein mentioned defendant PRAYZICH was employed by defendant EMPLOYERS COUNCIL, and in doing the things hereinafter alleged was acting within the course and scope of such employment.

8. At all times herein mentioned defendant PRAYZICH. was the attorney who represented defendant RALPHS in labor grievances and arbitration proceedings involving plaintiff, which are the subject of this action. Furthermore, the fraudulent, oppressive, and malicious actions directed against plaintiff by defendant PRAYZICH, as hereinafter alleged, were urged, approved, confirmed, ratified and adopted by defendants EMPLOYERS COUNCIL and RALPHS.

9. Defendant LOCAL UNION NO. 572, hereinafter referred to as "UNION", with its principal office and place of business located at 450 East Carson Plaza Drive, City of Carson, County of Los Angeles, State of California, is and at all times herein men-

tioned was a labor organization representing employees in an industry affecting interstate commerce. Defendant UNION was chartered and is affiliated with the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, and was engaged in, and had the duty of promoting and protecting the interests of its union members, including plaintiff.

10. At all times material to this action, defendant LOU DAVIS, hereinafter referred to as "DAVIS", was employed by defendant UNION in the capacity of business representative, and in doing the acts and omissions hereinafter alleged was acting within the course and scope of said employment. Furthermore, the arbitrary, hostile, dishonest and discriminatory actions directed against plaintiff by defendant DAVIS were urged, approved, confirmed, ratified and adopted by defendant UNION.

11. Defendant PAPPY, VOGEL, KAPLON and PHILLIPS, hereinafter referred to as "LAW

FIRM", is and at all times herein mentioned was a professional corporation organized and existing under the laws of the State of California and was duly registered with the State Bar of California as a law corporation, with its principal place of business located at 1730 West Olympic Boulevard, Suite 200, City of Los Angeles, State of California.

12. At all times herein mentioned defendant RALPH M. PHILLIPS, hereinafter referred to as "PHILLIPS", was an attorney at law, duly licensed to practice as such by the State of California. Defendant PHILLIPS was a member, agent and employee of defendant LAW FIRM, and in doing the acts and omissions hereinafter alleged was acting within the course and scope of such agency and employment. Defendants LAW FIRM and PHILLIPS held themselves out to plaintiff as specialists in labor law.

13. Plaintiff is informed and believes and thereon alleges that defendant UNION retained defendant LAW FIRM to represent its

union membership, including plaintiff, in labor disputes and arbitration proceedings against defendant RALPHS.

14. At all times herein mentioned defendant PHILLIPS was the attorney who represented plaintiff in her December 1, 1981 discharge and in her April 2, 1982 forced resignation grievances and was plaintiff's attorney at her March 12, 1982 arbitration hearing.

15. The true names and capacities of defendants sued herein as DOES 1 through 100, inclusive, are unknown to plaintiff, who therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.

16. At all times herein mentioned defendants DOES 1 through 25, inclusive, were agents and employees of defendant RALPHS; DOES 26 through 50, inclusive, were agents and employees of defendant EMPLOYERS COUNCIL; DOES 51 through 75, inclusive, were

agents and employees of defendant UNION; DOES 76 through 100, inclusive, were agents and employees of defendant LAW FIRM; and in doing the acts and omissions hereinafter alleges were acting within the course and scope of their agency and employment and with the full knowledge, approval and permission Of their respective employer.

17. At all times material to this action, there was in full force and effect a written collective bargaining agreement entered into and executed by defendant RALPHS and defendant UNION which controlled the terms and conditions of persons employed by defendant RALPHS in its deli-kitchen department and who were also members of defendant UNION. Pursuant to this collective bargaining agreement defendant UNION was the sole and exclusive bargaining agent and representative for those persons employed by defendant RALPHS in its deli-kitchen department.

18. The collective bargaining agreement in pertinent part provided that defendant

RALPHS could not discharge an employee except for good cause and further that defendant RALPHS and defendant UNION would not discriminate against an employee on account of sex, age, or for upholding the principals of unionism. Said collective bargaining agreement also contained a grievance procedure whereby an employee's discharge could be submitted to a neutral arbitrator for a hearing on the merits, and whose decision would be final and binding upon the parties.

19. At all times material to this action, plaintiff was employed by defendant RALPHS and was a member in good standing of defendant UNION.

20. In the years 1979 through 1982, numerous disputes arose between plaintiff and defendant RALPHS regarding the arbitrary, malicious, oppressive and discriminatory actions taken against plaintiff by her immediate supervisor, defendant RIVERA. Defendant RIVERA discriminated against plaintiff in the assignment of work duties;

discriminated against plaintiff in that she was issued written warnings without justification, whereas similar conduct by other employees was ignored; arbitrarily and discriminatorily ignored her seniority in layoff and rehiring matters; retaliated against plaintiff for upholding the principles of unionism and for filing complaints with the State Department of Fair Employment and Housing, the National Labor Relations Board, and the Equal Employment Opportunity Commission; wrongfully discharged plaintiff without just cause on December 1, 1981; wrongfully demoted plaintiff in job classification from cheese packer to sanitation and changed her work shift from days to nights and intentionally created more oppressive and burdensome working conditions intending to force plaintiff to terminate her employment, and which did result in her forced resignation on April 2, 1982. The aforementioned actions of defendants RIVERA and RALPHS were grossly unjust; without good

cause; against public policy; in breach of the implied covenant of good faith and fair dealing; and a willful breach of the collective bargaining agreement.

21. The reasons given by defendant RALPHS for plaintiff's December 1, 1981 discharge were dishonesty in production responsibilities and unsatisfactory work. Plaintiff alleges that the stated reasons for her discharge were false and were known by defendants RIVERA, RALPHS, DAVIS, UNION, PHILLIPS, LAW FIRM and PRAYZICH to be false. The real reason for plaintiff's December 1, 1981 discharge was for retaliation purposes because she would not permit defendant RIVERA to violate her rights under the collective bargaining agreement; because she engaged in concerted union activity; because she complained to defendant UNION and various governmental agencies about the harassment and discriminatory treatment directed against her by defendant RIVERA.

22. At all times while plaintiff was

employed as aforesaid, except for minor indiscretions, she performed her duties in a proper and workmanlike manner. Plaintiff complied with all terms and conditions of her employment contract and with the collective bargaining agreement, and to the extent possible, exhausted her contractual remedies provided for in the collective bargaining agreement.

23. During the years 1979 through 1982, plaintiff complained to her union representative, defendant DAVIS, and other UNION officials that her immediate supervisor, defendant RIVERA, was continuously acting toward her in an arbitrary, malicious, oppressive and discriminatory manner, as previously alleged in paragraph 20.

24. Immediately after her termination on December 1, 1981, plaintiff reported her wrongful discharge to defendant DAVIS and sought the assistance of defendant UNION in securing her reinstatement with defendant RALPHS. Thereafter, defendants RALPHS and

UNION scheduled plaintiff's December 1, 1981 discharge for arbitration hearing on March 12, 1982.

25. In undertaking to represent plaintiff in such grievances and arbitration hearing, defendants UNION and DAVIS breached their duty of fair representation owing to plaintiff in the following particulars, among others:

a. In ignoring plaintiff's complaints of discrimination, harassment and abuse by defendant RIVERA;

b. In failing to conduct a proper investigation of the facts underlying plaintiff's December 1, 1981 discharge and plaintiff's forced resignation of April 2, 1982;

c. In failing to subpena witnesses and present evidence at the March 12, 1982 arbitration hearing which would have negated "good cause" for her December 1, 1981 discharge;

d. In accepting defendant RALPHS' version of the facts regarding plaintiff's

December 1, 1981 discharge without sufficient proof of wrongdoing or just cause;

e. That at the March 12, 1982 arbitration hearing, defendant DAVIS with full knowledge of plaintiff's dire mental, emotional, physical and economic distress, and in collusion with defendants RIVERA, PRAYZICH, PHILLIPS and DOES 1 through 25, inclusive, coerced plaintiff into accepting a settlement of her December 1, 1981 discharge that was oppressive and unconscionable;

f. In refusing to take action to rescind or vacate the settlement agreement entered into on March 12, 1982, and to proceed with an arbitration hearing of her December 1, 1981 discharge despite plaintiff's request to do so.

26. The settlement agreement of plaintiff's December 1, 1981 discharge contained oppressive and unconscionable terms and plaintiff's apparent consent to such settlement was obtained by taking unfair advantage

of plaintiff's weak mental health and through deception, economic duress and undue influence exerted upon plaintiff by defendants RIVERA, PRAYZICH, DAVIS, PHILLIPS and DOES 1 through 25, inclusive.

27. The aforementioned actions of said defendants and each of them were fraudulent, arbitrary, dishonest, in bad faith and were committed with animosity towards plaintiff. Plaintiff alleges that had defendants DAVIS and UNION not breached their duty of fair representation, plaintiff would have been successful in securing reinstatement with defendant RALPHS at her former position of cheese packer with full back wages and benefits.

28. At the time of her wrongful discharge on December 1, 1981, plaintiff was employed by defendant RALPHS as a cheese packer in its deli-kitchen department, earning compensation at a rate of $11.59 per hour. Plaintiff was first in seniority in said department, having worked for defendant

RALPHS and its predecessor for over fourteen and one half years.

29. Plaintiff is ready, willing and able to work and desires reinstatement with defendant RALPHS to her former position as a cheese packer in its deli-kitchen department. Such reinstatement to be retroactive to the date of discharge without loss of wages, benefits or seniority.

30. As a proximate result of the plaintiff's wrongful discharge by defendant RALPHS and the tortious breach of the statutory duty of fair representation by defendant UNION, plaintiff has suffered loss of wages, loss of pension benefits, loss of insurance benefits and loss of other benefits she would have been entitled to had she not been wrongfully discharged. To date plaintiff has suffered in excess of $35,000.00 in loss of wages and benefits and she will continue to suffer such damage for an indefinite period in the future.

31. As a proximate result of the wrong-

ful and malicious discharge in violation of the collective bargaining agreement, and the union's breach of their statutory duty of fair representation, as previously alleges, and by reason of her lengthy unemployment, plaintiff has suffered and will continue to suffer severe mental, emotional and physical illness and distress, mental anguish, humiliation and embarrassment, all to her general damage in an amount according to proof at time of trial.

32. As a proximate result of the fraudulent, oppressive and malicious acts of the defendants and each of them, and her resulting physical and emotional injuries, plaintiff was compelled to, and did employ physicians, psychiatrists, psychologists, and other health care providers to examine, treat and care for her and she thereby incurred medical and incidental expenses. Plaintiff is informed and believes and thereon alleges that she will require such care and treatment for an indefinite period

in the future. The exact amount of such medical and incidental expenses, whether past, present or future is unknown at this time and plaintiff will amend this complaint to set forth said amounts when ascertained.

33. As a further proximate result of the wrongful discharge by defendant RALPHS and the breach of the statutory duty of fair representation by defendant UNION, plaintiff was compelled to, and did hire attorneys to secure and protect her rights under the collective bargaining agreement and thereby incurred and will continue to incur attorney fees and litigation expenses.

34. The acts of the defendants and each of them, leading to the plaintiff's wrongful discharge on December 1, 1981, and to her forced resignation on April 2, 1982, as aforesaid, were done with prior knowledge that plaintiff was a fifty one year old divorced woman supporting herself and her two children and that she depended upon such employment for economic survival. They

further knew that their actions could and did disqualify plaintiff from receiving state unemployment insurance benefits while she was attempting to favorably resolve such discharge grievances. Said actions were willful, fraudulent, malicious, oppressive, and were done with a conscious disregard of plaintiff's known rights and with the intention of causing or recklessly disregarding the substantial likelihood of inflicting severe emotional and physical injury and cruel and unjust hardship upon plaintiff, thereby justifying an assessment of punitive and exemplary damages in excess of $5,000,000.

SECOND CAUSE OF ACTION

CAUSE OF ACTION FOR DAMAGES AGAINST DEFENDANT FEDERATED DEPARTMENT STORES, INC., dba RALPHS GROCERY COMPANY FOR TORTIOUS BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

35. Plaintiff realleges and incorporates by reference each and every allegation con-

tained in paragraphs 1 through 26, inclusive, of her FIRST CAUSE OF ACTION.

36. At all times herein mentioned there exited between plaintiff and defendant RALPHS a written contract of employment. Said employment relationship was of a confidential nature and subject to the implied covenant of good faith and fair dealing.

37. Defendant RALPHS, in conspiracy with defendants EMPLOYERS COUNCIL, PRAYZICH, UNION, DAVIS, LAW FIRM, PHILLIPS and DOES 1 through 100, inclusive, and in abuse of their superior bargaining position breached the implied convenant of good faith and fair dealing in the following respects, among others:

a. In conspiring to deprive, and in depriving plaintiff of her right to continued employment without lawful justification;

b. In conspiring to deprive, and in depriving plaintiff of her right to an arbitration hearing of her December 1, 1981 discharge.

c. In conspiring to deprive, and in depriving plaintiff of her right to receive State unemployment insurance benefits.

38. As a direct and proximate result of the tortious breach of the implied covenant of good faith and fair dealing, and plaintiff's lengthy unemployment, plaintiff suffered grievous and extensive damages as follows:

a. Loss of wages and benefits, with interest thereon, in excess of $35,000.00;

b. Severe mental, emotional and physical distress and illness, and great embarrassment and humiliation, all to her detriment in an amount according to proof;

c. Past, present, and future medical and incidental expenses, according to proof;

39. Defendant RALPHS and the remaining co-conspirators acted fraudulently, maliciously and oppressively towards plaintiff and with a conscious disregard of plaintiff's known rights and with the intention of causing or recklessly disregarding the substan-

tial likelihood of inflicting severe emotional and physical injury and cruel and unjust hardship upon plaintiff, thereby justifying an assessment of punitive and exemplary damages in excess of $5,000,000.

THIRD CAUSE OF ACTION

CAUSE OF ACTION FOR DAMAGES AGAINST DEFENDANT FEDERATED DEPARTMENT STORES, INC., dba RALPHS GROCERY COMPANY FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

40. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1, 2, 3, 4, 5, 20, 21, and 22 of her FIRST CAUSE OF ACTION.

41. Following her wrongful discharge on December 1, 1981, and her constructive discharge on April 2, 1982, plaintiff filed claims for unemployment insurance benefits with the Employment Development Department of the State Of California.

42. Defendant RALPHS by and through its agents, servants and employees, from December

1981 through August 1982, orally and in writing represented to the Employment Development Department that plaintiff was a dishonest employee and was guilty of a number of acts of misconduct.

43. The aforementioned representations to the Employment Development Department were false and were known by defendant RALPHS, its agents, servants and employees to be false when made. Said representations were made with the intention of depriving plaintiff of her right to receive state unemployment insurance benefits and to cause her to suffer further emotional distress and financial hardship.

44. The true facts were that plaintiff was not a dishonest employee and was not guilty of the acts of misconduct as alleged. In fact, throughout her employment with defendant RALPHS, except for minor indiscretions, plaintiff performed her duties in a proper and workmanlike manner.

45. As a proximate result of the out-

rageous conduct of defendant RALPHS, its agents, servants and employees, plaintiff suffered severe mental, emotional and physical illness and distress all to her damage according to proof.

46. As a further proximate result of the aforementioned acts, plaintiff was compelled to, and did employ physicians, psychiatrists, psychologists and other health care providers to examine, treat, and care for her and plaintiff thereby incurred medical and incidental expenses.

47. The aforementioned acts of defendant RALPHS, its agents, servants and employees were willful, malicious, and oppressive, and were done with a conscious disregard of plaintiff's known rights and with the intention of causing or recklessly disregarding the substantial likelihood of inflicting severe emotional and physical injury and cruel and unjust hardship upon plaintiff, thereby justifying as assessment of punitive and exemplary damages in excess of

$5,000,000.00.

48. On October 4 and 26, 1982, after lengthy and time consuming appeal procedures with the State Employment Development Department and with the California Unemployment Insurance Appeals Board, it was determined that plaintiff was eligible to receive unemployment insurance benefits.

STATUTES INVOLVED

29 USCS §185

§185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent - Entity for purposes of suit - Enforcement of money judgments. Any labor organization which represents employees in an industry affecting com-

merce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2)

in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, c. 120, Title III, §301, 61 Stat. 156.)

28 USCS §1337(a)

§ 1337. Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49 [49 USCS § 11707], only if the matter in controversy for each receipt of bill of lading exceeds $10,000, exclusive of interest and costs.

(As amended Oct. 20, 1978, P.L. 95-486, §9(a), 92 Stat. 1633; Oct. 10, 1980, P.L. 96-417, Title V, §505, 94 Stat. 1743; Jan. 12, 1983, P.L. 97-449, §5(f), 96 Stat. 2442.)

29 USCS § 141

§ 141. Short title - Declaration of Policy

(a) This Act [29 USCS §§ 141-144,

151-158, 159-167, 171-183, 185-187, 191-197, 557] may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act [29 USCS §§ 141-144, 151-158, 159-167, 171-183, 185-187, 191-197, 557], in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers

in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interferernce by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

(June 23, 1947, c. 120, §1, 61 Stat. 136.)

29 USCS § 151

§151. Findings and policies

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of

industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or to the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substan-

tially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proven that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated

that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association,

self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

(July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101 in part, 61 Stat. 136.).

29 USCS § 160(b)

§160. Prevention of unfair labor practices

(b) Complaint and notice of hearing - Answer - Court rules of evidence inapplicable. Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member

thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to

appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C) [see 28 USCS §2072].

West's Ann. Cal. C.C.P. §338(1.)

Within three years: 1. An action upon a liability created by statute, other than a penalty or forfeiture.

West's Ann. Cal. C.C.P. §1288

§1288. [Service of petitions]

A petition to confirm an award shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner. A petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner.

Added Stats 1961 ch 461 §2.

CERTIFICATE OF SERVICE OF MAIL

I, RUDOLFO GINEZ, JR., a member of the Bar of the Supreme Court and attorney of record for Virginia Aragon, Petitioner herein, hereby certify that on August 14, 1985, pursuant to Rule 28.5, Rules of the Supreme Court, I served three copies of the within PETITION FOR CERTIORARI on each of the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with first-class postage in the United States mailbox in the City of Santa Ana, California, addressed to said parties as follows:

Pappy, Kaplon, Vogel & Phillips
A Professional Law Corporation
1545 Wilshire Blvd., Suite 211
Los Angeles, California 90017

Rosewell Bottum
A Professional Law Corporation
3200 Wilshire Blvd., Suite 1400
Los Angeles, California 90010

McLaughlin and Irvin
Lawyers
800 West Sixth Street, 3rd Floor
Los Angeles, California 90017

All parties required to be served have been served.

Executed at Santa Ana, California on August 14, 1985.

Rudolfo Ginez Jr.

Rudolfo Ginez, Jr.
Attorney of Record for
Petitioner, Virginia Aragon